IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 164 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHUPATAJI BADARJI THAKARDA & 1 - Appellant(s)
Versus
ARVINDKUMAR NARMADASHANKER JOSHI & 1 - Defendant(s)

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Appearance :

MR CHIRAG M PAWAR for Appellant(s) : 1 - 2, 2.2.2, 2.2.3,2.2.4
DELETED for Appellant(s) : 2,
MR SURESH M SHAH for Defendant(s) : 1,
None for Defendant(s) : 2,
NOTICE SERVED for Defendant(s) : 2.2.1, 2.2.2, 2.2.3,2.2.4

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 24/01/2007

ORAL JUDGMENT

1. Heard Shri Chirag M.Pawar, learned counsel for the appellants and Mr.Mehul S. Shah, learned counsel for the respondent No.1. None for the other respondents,

though served.

2. It is to be noted that the appellant No.2 had died and some officer of this Court, without appreciating the earlier orders made by this Court, made an amendment in the cause title by substituting the names of legal representatives of the appellant No.2. The said names were ordered to be deleted by this Court by its order dtd.9/11/2006, under the circumstances, neither the appellant No.2, nor his legal representatives are on records.
3. The two appellants (appellant No.2, since deleted) had filed the present Second Appeal, being aggrieved by the judgment and decree passed by the first appellate court, which had confirmed the judgment and decree passed by the learned trial court in a suit for declaration and injunction.
4. The respondent – plaintiff filed the suit submitting inter-alia that the mango tree situate on the boundary of Survey No.452 exclusively belongs to him and the defendants – appellants have no right, title or interest in the said mango tree nor they are entitled to take away the fruits. He also prayed for a declaration that being joint owner of Survey No.451/3, he is entitled to fetch

water from well situate in Survey No.451/3 and the defendants have no right to restrain him either from fetching water or from installing a machine / motor pump for drawing water from the well.

5. The defendants appeared before the trial court and submitted that the mango tree situate on the boundary of Survey No.452 belonged to them and the plaintiff had no right in the said mango tree or the fruits, they also submitted that the well situate in Survey No.451/3 exclusively belonged to the defendants, the plaintiff had no right to fetch water, they also submitted that as the plaintiff to satisfy his needs had sunk well in Survey No.452.

6. The learned trial court after recording evidence and hearing the parties, held that the plaintiff was successful in proving his case, it accordingly granted the declaration and issued the injunction. After the order was confirmed in appeal, the appellants are before this Court.

7. The appeal has been admitted for hearing on the following substantial questions of law;

(i) Should the court insist on formal proof of the death of a person by means of a death certificate when the date of

the death of that person very much appears on the record of the case?

(ii) Will the bar of jurisdiction contained in sec.36(A) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1948 apply to an invalid action?

8. Shri Shah, learned counsel for the respondents – plaintiff submits that as one of the appellant has expired during the pendency of these proceedings and his legal representatives have not been substituted on records, the appeal has abated as a whole.

9. Learned counsel for the appellants submits that the appeal would not abate because any joint owner would be entitled to challenge the judgment and decree passed by the learned first appellate court if he can show that he has independent right and is not claiming any right from the person who had died.

10. Without entering into the question of abatement of the appeal, I propose to decide the matter on merits.

11. The two courts have found on the basis of the revenue entries and on assessment of the evidence, which has been brought on record that the mango tree situate on the boundary of land bearing Survey No.452 belonged to

the plaintiff. The two courts have recorded the findings on the basis of oral evidence coupled with documentary evidence in the form of the revenue records. Both the parties led oral evidence to support their contention that the mango tree belonged to them. If the two courts, on due appreciation of the oral evidence, have come to the conclusion that the mango tree belongs to one of the party, then such finding would be a finding of fact and the same is not reversable in Second Appeal on simple ground that the yet another view is possible.

12. So far as the joint ownership of Survey No.451/3 and right of the plaintiff to fetch water is concerned, revenue records and the oral testimony of the parties and their witnesses show that the Survey No.451/3 jointly belongs to the parties and there situate a well in the said area. If Survey No.451/3 jointly belongs to the parties, then the parties certainly would be entitled to fetch water from the well situate in Survey No.451/3.

13. The plaintiff had proved his case and the courts below were not unjustified in holding that the Survey No.451/3 jointly belonged to the parties and the plaintiff has a right to fetch water from the said well.

14. Learned counsel for the appellants submitted that in

view of Sec.36(A) of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1948, Civil Court would have no jurisdiction in relation to the subject which falls within the exclusive jurisdiction of the revenue court or the revenue tribunal.

15. Present is not a case where the revenue proceedings, revenue orders, revenue certificate or revenue records are being challenged by the plaintiff. In fact, armed with the said proceedings and order, the plaintiff is seeking an injunction and a declaration from the Civil Court. Undisputedly, revenue court would have no jurisdiction to issue a declaration or grant and an injunction and if that be so, Civil Court certainly had jurisdiction to decide the matter.

16. I find no reason to interfere in the matter. The appeal deserves to and is accordingly dismissed.

17. In view of the final dismissal of the appeal, Civil Application No.560 of 1991 stands disposed of. Interim relief, if any, is vacated. No costs.

18. Let a decree be framed accordingly.

(R.S. GARG, J.)

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